



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/153787

PRELIMINARY RECITALS

Pursuant to a petition filed December 02, 2013, under Wis. Admin. Code § DHS 10.55, to review a decision by the Milwaukee County Department of Family Care - MCO in regard to Medical Assistance, a hearing was held on April 15, 2014, at Milwaukee, Wisconsin.

NOTE: The record was held open until April 29, 2014 to give Disability Rights Wisconsin (DRW) an opportunity to submit a brief and to give Milwaukee County Family Care an opportunity to respond. On April 22, 2014, DRW submitted its brief. It has been marked as Exhibit 7 and entered into the record. On April 29, 2014, Milwaukee County Family Care submitted its closing statement. It has been marked as Exhibit 8 and entered into the record.

The issue for determination is whether the Milwaukee County Department of Family Care correctly determined the Petitioner's level of care.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Hope Lloyd
IRIS and Family Care Ombudsman
Disability Rights Wisconsin
6737 W. Washington St. Suite 3230
Milwaukee, WI 53214

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Lillian Alford, Quality Insurance Coordinator
Milwaukee County Dept. of Family Care - MCO
901 N. 9th St.
Milwaukee, WI 53233

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii

Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. Petitioner suffers from numerous ailments including Cicatrical Pemphigoid (a blistering auto-immune disease), Bulous Dermatois, Type 2 Diabetes, Stage 3 Kidney Disease, Inflammatory Auto Immune Disorder, Post Traumatic Stress Disorder, Esophageal Reflux, Hypohthyrodism, asymmetrical hearing loss, chronic pain, viral labyrinthitis (inner ear infection), nutcracker esophagus (motility disorder), depressive disorder, myoclonus (involuntary muscle twitches), lymphedema, anxiety, hematochezia (the passage of blood into and with stool) and decreased peripheral vision. (Exhibit 4A and Exhibit 6, pg. 12)
3. On November 22, 2013, the Department of Milwaukee County Family Care sent the Petitioner a notice indicating that her level of care had changed from nursing home level of care to non-nursing home level of care. (Exhibit 1, pg. 2)
4. The Petitioner filed a request for fair hearing that was received by the Division of Hearings and Appeals on December 2, 2013. (Exhibit 1, pg. 1)
5. In May 2013, Project Access, a Care Management Unit, completed a Long Term Care Functional Screen of the Petitioner, indicating that the Petitioner was 1) independent with all activities of daily living, 2) needed assistance with three instrumental activities of daily living – meal preparation, laundry and/or chores and transportation, and 3) had no issues with communication or cognition. Project Access indicated Petitioner’s risk level to be at a 2. (Exhibit 6, pgs. 17-24)
6. In November 2012, the Milwaukee County Department of Family Care (the agency) completed another Long Term Care Functional Screen of the Petitioner that indicated that the Petitioner was 1) independent with all activities of daily living, 2) required assistance with one instrumental activity of daily living – transportation and 3) had no issues with communication or cognition. The agency assessed Petitioner’s risk level to be a 1. (Exhibit 6, pgs. 6-16)
7. Petitioner needs grab bars to bathe safely; she needs grab bars to toilet safely, and on occasion, she needs a cane to ambulate safely. (Testimony of Hope Lloyd, DRW Ombudsman; Testimony of Lynn [REDACTED] Project Access Case Manager; Exhibits 4H and 4I)
8. Petitioner does not need assistance with activities of daily living. She is able to independently bathe, dress, eat, walk with her cane, toilet herself with grab bars, and transfer from one surface to another. (Testimony of Hope Lloyd, DRW Ombudsman; Testimony of Lynn [REDACTED] Project Access Case Manager)
9. Petitioner is independent with all instrumental activities of daily living, except for transportation. (See Exhibit 7, pg. 3)

DISCUSSION

The Petitioner filed an appeal, because she disagreed with the agency’s determination that her level of care has dropped from nursing home level of care to non-nursing home level of care.

The terms “nursing home level of care” and “non-nursing home level of care” are given general definitions in Wis. Stats §46.286(1)(a):

- (a) *Functional eligibility.* A person is functionally eligible if the person's level of care need, as determined by the department or its designee, is either of the following:

- 1m.** The nursing home level, if the person has a long-term or irreversible condition, expected to last at least 90 days or result in death within one year of the date of application, and requires ongoing care, assistance or supervision.
- 2m.** The non-nursing home level, if the person has a condition that is expected to last at least 90 days or result in death within 12 months after the date of application, and is at risk of losing his or her independence or functional capacity unless he or she receives assistance from others.

In further defining levels of care for the Family Care Program, Wis. Admin. Code §DHS 10.33(2)(c) and (d) refers to “nursing home level of care” as “Comprehensive functional capacity” and it refers to “non-nursing home level of care” as “intermediate functional capacity”:

Comprehensive functional capacity level. A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:

- 1. The person cannot safely or appropriately perform 3 or more activities of daily living.
- 2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
- 3. The person cannot safely or appropriately perform 5 or more IADLs.
- 4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
- 5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
- 6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:
 - a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.
 - b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self-neglect or resistance to needed care.

Intermediate functional capacity level. A person is functionally eligible at the intermediate level if the person is at risk of losing his or her independence or functional capacity unless he or she receives assistance from others, as is evidenced by a finding from application of the functional screening that the person needs assistance to safely or appropriately perform either of the following:

- 1. One or more ADL.
- 2. One or more of the following critical IADLs:
 - a. Management of medications and treatments.
 - b. Meal preparation and nutrition.
 - c. Money management.

In the case at hand, DRW argues that both the prior Long Term Care Functional Screen (LTCFS) and the current LTCFS were wrong, because Petitioner cannot safely perform three activities of daily living (ADLs)

– bathing, mobility and toileting – and is therefore, at the nursing home level of care per Wis. Admin. Code §DHS 10.33(2)(c) 1.

It is undisputed that with the use of assistive devices, such as grab bars and a raised toilet seat that the Petitioner is independent with bathing and toileting. It is also undisputed that Petitioner uses a cane on at least rare occasions to ambulate and can therefore, ambulate independently. However, DRW argues that the very fact that Petitioner needs assistive devices to bathe, ambulate and toilet safely is proof she needs assistance as defined by the administrative code.

Milwaukee County Family Care asserts that the instructions for the LTCFS direct the screener to find a person independent with an ADL if he/she can safely perform the ADL with the use of an assistive device. The instructions for the LTCFS can be found on-line at:

<http://www.dhs.wisconsin.gov/LTCare/FunctionalScreen/LTCFSinstrux-clean.pdf>

A review of Section 4.2 – Overview of the ADLs/IADLs Module and Section 4.3 – Choosing Level of Help Ratings for ADLs/IADLs, of the LTCFS instructions does not reveal instructions to mark a person as independent with an ADL, if they need an assistive device to complete the task and can safely do so. (LTCFS Instructions, pgs. 4-2 and 4-3)

Under Section 4.5 Adaptive Equipment of the LTCFS instructions, there are no directions telling the screener to mark a person independent if they need an assistive device to complete a task and can safely do so. Although, with improvised equipment (versus actual medical equipment), if a person would otherwise need help from another person to perform the ADL, the instructions direct the screener to mark the person as needing assistance:

4.5 Adaptive Equipment

Four of the ADLs (Bathing, Mobility, Toileting, and Transferring) and two of the IADLs (Meal Preparation and Laundry and/or Chores) have some adaptive equipment listed. **Select only equipment the person currently needs, has, and is actually using.**

Sometimes a person will improvise to meet a need for equipment. For example, instead of a tub bench they may use a sturdy object to sit on during bathing. In this instance, you *would not select* ‘Uses tub bench’ in the bathing equipment box. *Do not* capture a person’s use of improvised or home-made items as a substitute for the equipment on the list.

A screener should only select the types of equipment listed on the LTC FS the person needs, has, and uses. Do NOT select a type of equipment that is a facsimile of what is on the list.

If a person uses an improvised or home-made item and *without it, they do not need* assistance from another person to complete the task, the screener should select 0: (Independent). Do NOT check the use of any equipment.

If a person uses an improvised or home-made item and *without it, they would need* any assistance from another person to complete the task, the screener should select 1: (Help is needed-helper need not be present throughout the task). Do NOT check the use of any equipment (for the improvised or home-made item).

(LTCFS Instructions, pg. 4-4)

The LTCFS instructions for bathing and toileting do not contain instructions to not to mark the box for assistance, if a person is able to perform the task with an assistive device. (LTCFS Instructions, pg. 4-6 and pg. 4-10) However, the LTCFS instructions do state that the box for assistance should NOT be marked if the person can walk himself/herself with an assistive device. (LTCFS Instructions, pg. 4-9)

Given that the LTCFS instructions do not provide clear instructions regarding how to treat an individual who can independently complete a task with the use of an assistive device, one must turn to the administrative code.

Wis. Admin. Code §DHS 10.13(6) defines assistance as, “cueing, supervision or partial or complete hands-on assistance from another person.”

The administrative code definition does not include in its definition of “assistance”, the aid or use of a device, adaptive equipment or piece of medical equipment. It only refers to cueing from *another person*, supervision from *another person* and the partial or complete hands on assistance from *another person*.

Because the Petitioner does not need cueing from a person, supervision from a person or hands-on assistance of another person to safely bathe, walk or toilet and only needs adaptive equipment to complete these tasks safely, she does not need “assistance” as defined by Wis. Admin. Code §DHS 10.13(6), above.

Thus, it is found that Petitioner needs assistance in only one area, transportation. Applying the criteria set forth in Wis. Admin. Code §DHS 10.33(2)(c) and (d), above, it is found that the Petitioner is at the non-nursing home/intermediate functional capacity level of care.

CONCLUSIONS OF LAW

Milwaukee County Family Care correctly determined Petitioner’s level of care.

THEREFORE, it is **ORDERED**

That the petition is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

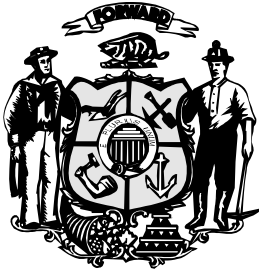
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 30th day of April, 2014.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on April 30, 2014.

Milw Cty Dept Family Care - MCO
Office of Family Care Expansion
hope.lloyd@drwi.org